Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)))	**IB Docket No. 97-142**

To: The Commission

SUPPLEMENTAL COMMENTS OF CABLE & WIRELESS, PLC AND CABLE & WIRELESS INC.

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SUMMARY

AT&T has proposed in its comments and *ex parte* filings in this proceeding that the Commission condition all new and existing resale Section 214 authorizations granted to foreign-affiliated U.S. carriers on the compliance of the foreign affiliates with the recently adopted benchmark settlement rates. As Cable & Wireless plc ("C&W") and Cable & Wireless Inc. ("CWI") demonstrate in these Supplemental Comments, adoption of such a condition would have a devastating impact on U.S. consumers because it would severely restrict competition in the market for international services.

AT&T contends that the resale Section 214 condition is necessary to prevent a foreign carrier from entering into a "price squeeze" -- *i.e.*, offering below-cost collection rates as a mechanism to stimulate new settlement revenues sufficient to more than offset the losses. AT&T, however, provides no evidence that this is a real likelihood. In fact, CWI and other foreign-affiliated carriers have operated in the United States on affiliated routes for many years -- in CWI's case, on approximately 30 affiliated routes for more than ten years -- during which time no party has ever alleged that CWI or any other similarly situated carrier has engaged in a price squeeze. This is not surprising when the realities of the international market are considered. Since carriers providing international service must tariff their rates and all competing carriers have detailed information about costs. Any "price squeeze" behavior would be immediately detected and would elicit government enforcement actions by the FCC, the Department of Justice or the FTC. Even if there were a rational basis for assuming that foreign-affiliated U.S. carriers might engage in the anticompetitive conduct postulated by AT&T, it is not necessary to condition resale Section 214 authorizations to

address this threat; there are ample market and regulatory disciplines to prevent such behavior.

The only support that AT&T can muster for its position are the statements of Dr. Lehr. However, as the attached statement of Dr. Darby explains, Dr. Lehr's analysis is "entirely hypothetical and relies on market suppositions that are clearly contradicted by practical and theoretical considerations." For example:

- Dr. Lehr assumes that the U.S. international services market is perfectly competitive, such that price reductions are evidence of below-cost pricing, despite the FCC's recognition of the imperfections in the U.S. market, and the fact that the WTO Basic Telecom Agreement will introduce competition that will greatly undercut this theory;

- Dr. Lehr assumes that AT&T's retail rates are based on TSLRIC, despite the fact that carriers simply do not establish retail rates at this level;

- Dr. Lehr assumes, without support, that the reaction of U.S. carriers to a below-cost pricing strategy on a particular international route would be to match the reseller's prices, when a more rational response would be to respond competitively while pursuing regulatory and legal sanctions against the resale carrier;

- Dr. Lehr's below-cost pricing scenario hinges on the unrealistic assumption that the foreign-affiliated U.S. carrier could quickly achieve a 10% retail market share;

- Dr. Lehr assumes that the foreign carrier's resale affiliate will have the same cost structure as AT&T on the affiliated route, which is contrary to U.S. industry experience;

- Dr. Lehr assumes that customers will quickly migrate to the foreign-affiliated carrier that implements a below-cost pricing strategy on an affiliated route, ignoring the fact that many business customers are under contract to their current carriers and thus unlikely to move; and

- Dr. Lehr implicitly assumes that U.S. carriers with foreign affiliates could engage in below-cost pricing on all affiliated routes, despite the fact that traffic on some routes is insufficient to allow the foreign affiliate to engage in the mischief envisioned by Dr. Lehr.

Since Dr. Lehr's analysis relies on numerous assumptions that are at best unproven or in some cases simply untrue, it cannot serve as a basis for adopting AT&T's proposal.

While the adoption of the proposed resale Section 214 condition would serve no public interest purpose, it would undermine competition to the detriment of U.S. consumers. Such a condition would effectively prevent foreign-affiliated carriers from continuing to serve their subscribers. Subscribers would experience disruption and inconvenience as they were forced to make new arrangements with different carriers on precluded routes, and possibly find that they cannot get the features and functions they want at prices they find reasonable. Overall, the subscriber issues and the carriers' inability to serve existing and future subscriber needs would force the U.S. foreign-affiliated carrier to scale back its operations to the point of not being competitive or exit the market altogether.

It is important to recognize that great harm will occur just by the imposition of a condition that could lead to revocation of a Section 214 authorization. As the Commission has recognized in other contexts, conditions on resale authorizations that present even the risk of license revocation lessen competition by creating substantial uncertainty in the financial and subscriber communities.

Moreover, in making its proposal, AT&T simply ignores the fact that its proposed resale condition is inconsistent with prior FCC statements and existing policies. The Commission has found repeatedly through the years that the resale of switched services presents no substantial possibility of anticompetitive effects. Indeed, the Commission itself recognized in this proceeding's NPRM that resale presents no significant anticompetitive concerns.

Adoption of the proposed resale Section 214 condition would also place the U.S. in violation of its obligations under the WTO Agreement. In the absence of a demonstration of competitive harm or distortion flowing from the resale operations of foreign-affiliated U.S. carriers, the FCC cannot restrict entry by foreign carriers as proposed consistent with the U.S. commitments regarding market access. In addition, application of the proposed condition would unjustifiably discriminate against foreign-affiliated U.S. carriers, in violation of U.S. MFN and NT obligations.

Adoption of AT&T's proposed resale Section 214 condition would also raise constitutional concerns. The rights inherent in the Section 214 authorizations held by CWI are private property interests protected by the Fifth Amendment's prohibition of governmental taking without just compensation. Since the economic impact of the condition on CWI would be severe -- CWI has expended hundreds of millions of dollars to develop a profitable carrier business -- such impact alone would be sufficient to demonstrate a taking. The FCC has no expressed or impled authority under the Communications Act to effect such a taking and thus any FCC action to modify CWI's Section 214 authorizations to impose the resale condition would be unlawful.

Finally, any attempt by the FCC to adopt AT&T's proposed resale Section 214 condition would be fail as a matter of law because of inadequate public notice. The *Foreign Participation Notice* contained no suggestion that the Commission was considering imposing conditions on any Section 214 resale authorizations.

In sum, AT&T's proposal will only serve to lessen competition and prevent the public from receiving the benefits of full and fair competition. For this reason, the FCC should not adopt the resale Section 214 condition proposed by AT&T.

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Cable & Wireless, plc ("C&W") and Cable & Wireless Inc. ("CWI") (collectively, the "C&W companies"), by their attorneys, hereby submit supplemental comments in the above-captioned proceeding[1/] in response to an *ex parte* proposal of AT&T Corp. ("AT&T") to condition existing, as well as future, Section 214 switched resale authorizations of foreign-affiliated U.S. international carriers on their affiliate's compliance with the international benchmark settlement rates. The C&W companies, for the reasons discussed below, urge the Commission to recognize that adoption of the proposed Section 214 resale condition would hurt U.S. consumers by lessening competition and thus not be in the public interest.

I. INTRODUCTION

The FCC decided in its *Settlement Rates Decision*,[2/] *inter alia*, to impose a condition on all Section 214 authorizations for facilities-based switched or private line services

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1/ *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, File No. IB 97-142 (rel. June 4, 1997) ("*Foreign Participation Notice*").

2/ *See International Settlement Rates*, Report and Order, FCC 97-280, ¶¶ 228-231 (Aug. 18, 1997) ("*Settlement Rates Decision*"); *International Settlement Rates*, FCC 96-474 (rel. Dec. 20, 1996), Notice of Proposed Rulemaking ("*Settlement Rates Notice*").

held by foreign-affiliated U.S. carriers that their foreign affiliates meet the settlement rates specified by the FCC in that decision. According to the *Settlement Rates Decision*, this condition is necessary to prevent what AT&T has characterized as the ability of foreign-affiliated U.S. carriers to engage in "anticompetitive price squeezes." *Id.*, ¶¶ 220-226. The decision also established a transition period for each country so that the effect of the new accounting rate on existing social policies and business interests would be lessened. Without explanation, however, the decision denied a transition period to any country route where affiliated entities operated. All foreign-affiliated U.S. carriers were required to negotiate new settlement rates by March 31, 1998 -- 90 days after the effective date of the *Settlement Rates Decision*. *Id.*, ¶ 229. Carriers failing to meet the new benchmark condition were subject to enforcement action. *Id.*, ¶ 231.

AT&T originally had suggested in its written comments in this proceeding that in addition to the various restrictions on foreign carriers proposed in the *Notice*, the Commission also should condition all *new and pending switched resale* Section 214 authorizations of foreign-affiliated U.S. carriers on acceptance of the benchmark settlement rates in much the same way that it conditioned facilities-based authorizations in the *Settlement Rates Decision*.[3/] AT&T in *ex parte* statements now has broadened its proposal to include all *existing* Section 214 switched resale authorizations of foreign-affiliated U.S. carriers.[4/] This

[3/] Specifically, AT&T proposed that a benchmark condition be imposed on all authorizations for switched resale or facilities-based service granted to foreign-affiliated U.S. carriers, and to all applications for such authority pending, on or after December 19, 1996, the date that the Commission released its Notice in the *Settlement Rate* proceeding. *See* Comments of AT&T Corp., IB Docket No. 97-142, at 33 n.60 (filed July 9, 1997) ("AT&T Comments").

[4/] *See Settlement Rates Decision*, ¶ 230.

is contrary to prior Commission decisions and statements on this issue. As interested parties previously have not had an adequate opportunity to respond to the proposal, the C&W companies submit these comments and request the FCC to accept them in the interest of ensuring a full record.[5]

II. AT&T PROVIDES NO RATIONAL BASIS -- AND THERE IS NONE -- TO SUPPORT ADOPTION OF THE PROPOSED RESALE SECTION 214 CONDITION.

AT&T asserts that the resale Section 214 condition is necessary to prevent foreign carriers from entering into a "price squeeze", *i.e.*, offering below-cost collection rates as a mechanism to stimulate new settlement revenues sufficient to more than offset the losses.[6] As a practical matter there is no factual basis to support AT&T's allegation that a condition on all existing resale Section 214 authorizations of foreign-affiliated U.S. carriers is necessary to prevent such carriers from engaging in "price squeezes." Moreover, as discussed in the attached statement of Dr. Darby, AT&T allegations are not supported by economic theory as well.[7] AT&T's "price squeeze" scenario simply is based on numerous erroneous factual and economic assumptions.

A. There Is No Historical Evidence to Support AT&T's Theory.

The misconduct theorized by AT&T, *i.e.* below-cost pricing by foreign-affiliated U.S. resale carriers, has never materialized. CWI has been providing international switched

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[5] We are sending these comments to all commenters in this proceeding.

[6] *See* AT&T Comments at 31-33 and attached Affidavit of William H. Lehr ("Lehr Affidavit").

[7] See attached statement of Dr. Larry F. Darby ("Darby Statement"), dated October 30, 1997.

resale services on approximately 30 affiliated routes for more than ten years. During that period the relevant accounting rates were higher than now. Thus, if there ever was a time in which AT&T's theory would have been proven correct, it was in the recent past.[8] Despite this, no party has ever alleged that CWI or any other similarly situated carrier has engaged in a price squeeze.[9]

B. No Rational Foreign-Affiliated U.S. Resale Carrier Would Willfully Engage in an Unlawful Predatory Pricing Enterprise Where the Risks of Detection Are Great and the Potential Benefits Remote and Short-Lived.

AT&T's theory that carriers would deliberately incur losses in order to stimulate settlement revenues for their foreign affiliates is not only contrary to established marketplace behavior and precedent, it is counter-intuitive.[10] As Dr. Darby points out in his statement no rational carrier would even consider such a plan unless it was certain to result in significant net profits for an extended period of time -- and there is no basis to believe it would.[11]

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[8] FCC statistics show a steady decline in settlement rates in the 1990s. The average per minute settlement owed for U.S.-billed calls dropped from $.70 in 1990 to $.48 in 1995. *See Trends in Telephone Service*, FCC Industry Analysis Div., at 78, Table 50 (rel. Mar. 28, 1997). Thus, the incentives for U.S. carriers with foreign affiliates to engage in the misconduct alleged by AT&T are weaker today than they have ever been.

[9] AT&T alleged in opposing GTE Telecom's application for authority to provide international resale services to Venezuela and the Dominican Republic that GTE *could* conceivably engage in such behavior, but did not provide evidence that GTE had in fact done so through other subsidiaries. *See GTE Telecom Inc.*, DA 96-1546, 1996 WL 523440, ¶¶ 38-39 (rel. Sept. 16, 1996).

[10] *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful").

[11] See Darby Statement, pp. 17-20. By AT&T's own worst-case quantitative measure, a foreign carrier would achieve net profits of approximately US$15,000 per year on a route characterized by more than a million minutes of traffic through a risky below-cost pricing

(continued...)

Moreover, no carrier could hope to engage in a below-cost pricing scheme without immediate detection by U.S. carriers and the FCC. AT&T and other U.S. carriers have detailed information on their own costs, and any new carrier entering the U.S. international resale market is unlikely to have lower costs.[12/] Further, foreign carriers must tariff their rates with the FCC, thereby providing both competing carriers and the FCC with immediate information about their price levels. Therefore, both competing carriers and the FCC would know immediately if any carrier were to implement a below-cost pricing scheme in the U.S. market. Other U.S. carriers could pursue, and the FCC could initiate, appropriate regulatory or legal proceedings to investigate the resale carrier and stop any unlawful conduct.[13/]

As below-cost pricing clearly is an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act,[14/] the FCC can resolve any problem that could develop. In addition, the below-cost pricing scheme theorized by AT&T would present a

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[11/](...continued)
strategy. Dr. Lehr's supplemental statement purports to show that such profits might even be as much as US$40,000. It is irrational to conclude that a foreign carrier would be willing to commit the resources and take the risks inherent in a below-cost pricing strategy for such a trivial monetary gain.

[12/] The FCC's proposed basic safeguards in the *Foreign Participation Notice* would supplement the ability of the FCC and competing carriers to monitor closely the pricing and other business activities of U.S. carriers with foreign affiliates. In particular, the FCC has proposed quarterly traffic and revenue reports that would permit virtually immediate detection of any below-cost pricing schemes initiated by U.S. carriers with foreign affiliates, as well as any traffic migration caused by the pricing practices of such carriers. *Foreign Participation Notice*, ¶¶ 98-101. Given the mechanisms the Commission is putting into place to ensure reliable, early detection of misconduct by foreign-affiliated carriers, it is regulatory overkill for the FCC to impose switched resale Section 214 conditions on top of those safeguards.

[13/] *See* 47 U.S.C. §§ 4(i), 204-05, 206-08, 211, 403, 501-04.

[14/] 47 U.S.C. § 201(b). *See, e.g.*, *Competitive Carrier Rulemaking*, 77 FCC 2d 308, 334 (1979); *PanAmSat Corp. v. COMSAT Corp.*, 12 FCC Rcd 6952, 6957 (1997).

serious risk of antitrust law violations. Normally, below-cost pricing that has a negative effect on competition in a relevant market also is unlawful under Section 2 of the Sherman Act (15 U.S.C. § 2).[15] The Supreme Court has held that a case of predatory pricing is made by a demonstration that the prices complained of are below an appropriate measure of cost, and that the defendant had a reasonable prospect of recouping its investment in below-cost prices.[16] The Antitrust Division of the Department of Justice and the FTC both have shown no unwillingness to prosecute cases of predatory pricing.[17] There simply is no basis upon which a carrier could expect to escape detection or remedial government action.

As a result, even if there were a reasonable basis for assuming that foreign-affiliated U.S. resale carriers might engage in the type of anticompetitive conduct described by AT&T, conditioning resale authorizations on compliance with benchmark settlement rates is an over-broad remedy for any such perceived anticompetitive threat. There are ample market and regulatory disciplines to prevent such a strategy *without* imposing Draconian market access restrictions. In the *Settlement Rates Decision*, the FCC adopted specific policies to deal with any below-cost pricing by foreign-affiliated facilities-based carriers. While the C&W companies believe that such policies are not necessary, they show that the FCC can address below-cost pricing directly when the FCC believes it is necessary to do so. It is overbroad for the FCC to exclude a U.S. carrier from the resale market altogether due to its foreign

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[15] *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986).

[16] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[17] *See* Remarks of Roger W. Fones of the Antitrust Division before the ABA, "Predation in the Airline Industry" (June 12, 1997); *International Tel. and Tel. Corp.*, 104 F.T.C. 280, 423 (1984).

affiliate's above-benchmark rates which will not necessarily lead to the behavior that the FCC desires to prevent.

C. Dr. Lehr's "Price Squeeze" Theory Is Based on Numerous Incorrect and Baseless Assumptions.

The only support AT&T can muster for its argument that U.S. carriers with foreign affiliates will begin doing something now that they have never done before -- namely, engaging in below-cost pricing as resale carriers for the purpose of maximizing settlement revenues for the foreign affiliate -- are the statements of Dr. Lehr. The analysis in them, however, relies upon numerous assumptions that are at best unproven or in some cases simply untrue, and therefore cannot be relied upon.

Dr. Lehr's theory rests on the assumption that the U.S. international services market is perfectly competitive, such that any price reductions are evidence of below-cost pricing, and that retail rates are at TSLRIC levels. As Dr. Darby points out, this assumption is unreasonable.[18] As noted below,[19] the FCC's decisions and reports recognize that the U.S. market is not even close to being fully competitive. Dr. Lehr's incorrect assumption about the competitiveness of the U.S. market is central to the intellectual credibility of his theory -- it is the glue that holds together his price squeeze theory. Even Dr. Lehr acknowledges that in the absence of perfection, competition would reduce prices legitimately. Also, Dr. Lehr acknowledges that competition introduced by the WTO Basic Telecoms Agreement will greatly undercut his theory.[20] By assuming perfect competition, Dr. Lehr is able to

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[18] Darby Statement at 10-12.

[19] *See* note 27 *infra.*

[20] *See* Lehr Affidavit at 9, 12.

ignore improperly the negative impact of the resale Section 214 condition in excluding existing and potential carriers who would impose lawful price competition against AT&T's excessive international rates.

Second, it strains credulity to posit that AT&T's retail rates are based upon TSLRIC. TSLRIC applies in theory to *wholesale* not *retail* products. Even in a fully competitive market, carriers do not establish retail rates at TSLRIC levels. Dr. Lehr's assumption that true retail joint and common costs are negligible or already included in TSLRIC (Lehr Affidavit at 14 n.19) is not believable.[21] Dr. Lehr also fails to provide any basis for his assumption that the TSLRIC for terminating U.S.-outbound traffic in foreign countries is $.10/minute or less, and that any settlement revenues received by the foreign carrier at a higher rate would be used "to pursue anticompetitive strategies in the US."[22] In fact, it is undisputed that termination costs vary significantly by country.[23]

Dr. Lehr also assumes, without support, that the reaction of U.S. carriers to a below-cost pricing strategy on a particular international route would be to match the reseller's prices. A more rational response from U.S. carriers would be to beat the new price while pursuing regulatory and legal sanctions against the resale carrier.[24] If that

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[21] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15852 (1996).

[22] Lehr Affidavit at 9 and 14.

[23] In the *Settlement Rate Decision*, the FCC initially concluded that a foreign carrier's termination costs were approximately $.09/minute, but the FCC discarded that analysis when it adopted final rules. In footnote 122, the FCC conceded that "[t]here is no record evidence" to support the $.09/minute estimate. The record in IB Docket No. 96-261 proves beyond doubt that termination costs vary significantly from one country to another, and the FCC has conceded that costs vary among countries.

[24] Darby Statement at 18.

were to happen, then Dr. Lehr's predictions of traffic stimulation would not be correct, and the U.S. foreign-affiliated carrier would not achieve the necessary settlement revenues to justify the below-cost scheme. Given the above, foreign carriers obviously are not likely to initiate such a scheme when its success depends solely upon the actions of U.S. carriers.

Dr. Lehr's below-cost pricing scenario also hinges upon the assumption that the foreign-affiliated U.S. carrier through this strategy would quickly achieve a 10% retail market share in the United States. Dr. Lehr does not provide any support for assuming a 10% market share. Neither does Dr. Lehr provide even one example where a resale carrier has achieved a 10% market share on a route. Nor does Dr. Lehr recognize that the foreign carrier would have to consider the possibility of not achieving a sufficient market share in its risk analysis as a reason not to engage in a below-cost pricing scheme. The fact that below-cost pricing schemes may result in retail market share of less than 10 percent undermines the conclusion that foreign-affiliated U.S. resale carriers have an incentive to achieve net profits through a below-cost pricing scheme.

Dr. Lehr, moreover, assumes that the foreign carrier's resale affiliate will have the same cost structure as AT&T on the affiliated route. That assumption is unsupported and contrary to U.S. industry experience. Few, if any, U.S. carriers can achieve the economies of scale and scope that AT&T enjoys today with its ubiquitous network, entrenched customer base, and significant traffic volume. Were Dr. Lehr to assume more reasonably that the foreign-affiliated carrier has significantly higher unit costs than AT&T, the putative "net profits" from the below-cost pricing scenario would be reduced or disappear and the reseller would be unable to price below its cost.

Dr. Lehr also assumes that customers will quickly migrate to the foreign-affiliated U.S. resale carrier who implements a below-cost pricing strategy on an affiliated route. That assumption is unsupported and not credible. Many business customers are under contract to their current carriers with monetary penalties for early termination. As a result, Dr. Lehr seriously overestimates the market share that the carrier could earn as well as the amount of traffic that would be stimulated by below-cost prices.

Dr. Lehr implicitly assumes, regardless of the overall level of traffic to the country of affiliation, that U.S. carriers with foreign affiliates could engage in below-cost pricing on all affiliated routes. Yet the fact remains that on some routes -- most notably developing countries -- traffic is insufficient to allow the foreign affiliate to engage in the misconduct envisioned by Dr. Lehr. The FCC itself recognizes that where traffic on a route is *de minimus*, there is no realistic possibility of anticompetitive behavior.[25]

In essence, as Dr. Darby points out, Dr. Lehr's conclusions are based on an unsupportable analytical foundation. He finds that Dr. Lehr's analysis hypothetical and relies on market suppositions that are clearly contradicted by practical and theoretical considerations." Further, while Dr. Lehr has equated harm to AT&T with harm to consumers, Dr. Darby points out that "[c]reating harm and threat . . . to [competitors] is the very essence of

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[25] *See Merger of MCI Communications Corporation and British Telecommunications, PLC*, GN Docket No. 96-245, ¶ 214, n.304 and ¶¶ 290-91 ("*BT/MCI*") (Gibraltar is not subject to the effective competitive opportunities test and MCI will not be dominant on U.S.-Gibraltar route, despite the fact that BT controls the monopoly provider of international telecommunications services in Gibraltar, because total U.S.-billed minutes to Gibraltar is *de minimus*).

successful competition policies."[26] Overall, Dr. Lehr's testimony simply cannot serve as a proper basis for placing conditions on resale Section 214 authorizations as AT&T urges.

III. IN THE ABSENCE OF ANY EVIDENCE OF POTENTIAL ANTICOMPETITIVE ACTION, CONDITIONING SECTION 214 RESALE LICENSES AS REQUESTED WOULD ONLY UNDERMINE COMPETITION TO THE DETRIMENT OF U.S. CONSUMERS.

As discussed in the preceding section, there is no evidence of potential anticompetitive harm -- nor has anyone provided any -- to support adoption of AT&T's proposed condition. In the absence of any such evidence, adoption of the proposed Section 214 resale condition would only undermine effective competition and harm U.S. consumers in direct conflict with the Commission's public interest mandate and the FCC's stated goals for this proceeding.[27] Effective competition promotes U.S. consumer interests by allowing consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiency, and price competitiveness. These interests are clearly at stake here -- especially given the FCC's acknowledgment that the U.S. international services market is far from competitive.[28]

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[26] Darby Statement at 15-16.

[27] The Commission states in the *Notice* that the primary goal of this proceeding is to advance the public interest by promoting effective competition. *Foreign Participation Notice*, ¶ 25.

[28] *See Regulation of International Accounting Rates*, 11 FCC Rcd 20063, 20066, Phase II, Fourth Report and Order (1996) ("[t]here is significant evidence that the current market structure for international services in the United States is not producing sufficiently competitive results"); AT&T Comments, Lehr Affidavit at 5-6 ("the markets for [U.S.] local and international services are not adequately competitive"); Declaration of Paul W. MacAvoy, filed March 31, 1997 in IB Docket No. 96-261, at 2-3 ("empirical evidence indicates that [U.S.] outbound international tariff rates are not competitive"); *BT/MCI*, ¶ 55 n. 91.

A. Adoption of the Resale Condition Will Harm Actual and Potential Competition.

There is a major policy difference between the imposition of the *Settlement Rates Decision* Section 214 condition and the one proposed by AT&T. Imposing the condition upon facilities-based authorizations in the *Settlement Rates Decision* makes it more difficult and expensive for U.S. carriers with foreign affiliates to serve particular routes. However, given the competitive environment, those extra costs will have to be accepted by the carrier and not passed on to consumers. AT&T's current proposal goes much further by preventing carriers from continuing to serve their customers. As a result of being unable to serve an affiliated route, a U.S. reseller inevitably would lose existing customers and be unable to grow its customer base. In addition, the U.S. carrier would incur termination costs with equipment and service vendors as well as with customers as it was forced to scale back its operations. Indeed, most resale carriers have agreements with their underlying U.S. carriers which require volume commitments for international traffic. Foreign-affiliated U.S. carriers will be forced to pay penalties for their inability to continue delivering traffic. This will result in even greater costs for any remaining customers. The ultimate result is obvious. The impact of the proposed condition on CWI alone provides a case on point. CWI serves nearly 80,000 customers in the U.S. Of these customers, nearly 50% made at least one call to a CWI-affiliated country in the last three months. The condition being considered by the FCC would effectively force CWI to discontinue service to several countries, resulting in a loss of millions of dollars in revenue for the company.

This likely would have the effect of putting CWI out of the resale business in the United States. CWI could no longer guarantee "one-stop shopping" for international long distance service if the resale condition was adopted. The loss of the "one-stop shopping" will greatly diminish CWI's competitiveness to the point that it likely could not survive.[29] CWI would have to inform its existing customers of the uncertainty of CWI's continued full service to them, and would have to advise potential customers of the limitations on its ability to offer full service. Given a choice, these customers would prefer "one-stop shopping" to the alternative of cobbling together service packages from various providers. It is an unavoidable conclusion that CWI's current business would be put at great risk, to the point of threatening its continued viability, if the resale condition were adopted.

Significantly, it is not necessary that the FCC revoke the resale authorization of a foreign-affiliated U.S. carrier in order for competition to be harmed. Competition is harmed simply by the adoption of such a condition. The FCC recognized in *fONOROLA* that license conditions on resale authorizations that result in the immediate suspension of the authorization upon the occurrence of certain events place resellers at a competitive disadvantage by creating market and financial uncertainty and by hampering the availability of long term financing.[30] The FCC also found that such license conditions ultimately inhibit the entry of foreign carriers in the market and could discourage foreign administrations from opening their own markets to resale.[31] Here, imposing the condition will allow AT&T and others to use it in their marketing efforts to convince potential customers that they should not take service from U.S. carriers with foreign affiliates. Such circumstances will discourage new

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[29] Indeed, in this very proceeding, the Commission has acknowledged the benefits to U.S. consumers of "one-stop shopping" and the need to avoid unnecessary limitations on those benefits. *See Foreign Participation Notice*, ¶ 105.

[30] *See fONOROLA Corp.*, 9 FCC Rcd 4066, 4069-70, Order on Reconsideration (1994) ("*fONOROLA*").

[31] *Id.*

entry by foreign carriers into the U.S. market and new investment in existing U.S. carriers with foreign affiliates. Conversely, U.S. carrier investment in carriers overseas also will be discouraged.[32]

B. The Proposed Resale Condition Will Harm U.S. Consumers.

By affecting existing and potential competition in U.S. and foreign markets, the proposed condition will harm U.S. consumers and disrupt service. The Commission's policy in the past has been to tailor its regulations to avoid harm to consumers.[33] For existing customers of U.S. carriers with foreign affiliates, the proposed resale condition would generate substantial uncertainty by virtue of the possibility that the Commission might revoke a carrier's authorizations on certain routes. Were the Commission in fact to revoke a carrier's authorizations, it obviously would be disruptive and harmful. Customers would be forced to make new arrangements with different carriers on precluded routes. Some customers would not be able to obtain the same services that they currently receive from other carriers. If equivalent services were available, customers might not be able to obtain similar terms and conditions for the service, might be liable for new nonrecurring charges and additional service terms, or could lose the term and volume discounts for which they

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[32] The FCC has recognized that U.S. consumers benefit from U.S. participation in competitive markets abroad. *See Foreign Participation Notice*, ¶ 27.

[33] *See, e.g.*, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd 4712, 4723, Memorandum Opinion and Order (1993) (temporary rate equalization plan adopted for converting access rates to uniform, cost-based rates to avoid customer rate shock); *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961, 8974, First Report and Order (1995) (price caps protect customers from cross-subsidization, rapid rate increases, and predatory pricing); *Access Charge Reform*, FCC 97-158, ¶ 38 (May 16, 1997), First Report and Order (subscriber line charges capped for primary residential and single-line business users to assure affordability of basic phone service).

qualify for under their previous service arrangements. In other cases, customers could find it necessary to reconfigure CPE or spend funds on new equipment to obtain equivalent features and functions from their new service providers. Thus, only incumbent carriers -- not consumers -- would benefit.

C. The Resale Condition Is Inconsistent With Existing FCC Policies.

Adoption of the proposed condition would be inconsistent with the FCC's historical view that resale is pro-competitive. The Commission has consistently and repeatedly found through the years that the resale of switched services presents no substantial possibility of anticompetitive effects.[34/] The FCC has held that the public interest is best served by granting all carriers, whether U.S. or foreign-affiliated, resale Section 214 authorizations. Thus, the Commission has granted many resale authorizations to foreign-affiliated U.S. carriers, specifically noting that such authority raises no concerns about anticompetitive

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[34/] *See, e.g.*, *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331, 7335, Report and Order (1992) ("*International Services*"); *Market Entry and Regulation of Foreign-affiliated Entities*, 10 FCC Rcd 4844, 4872, Notice of Proposed Rulemaking (1995) ("*Foreign Carrier Market Entry Order*") ("[w]e do not believe there is a need to regulate foreign carrier entry into the U.S. market for resale services as closely as we propose for facilities-based services [as] [t]here is not as substantial a risk of anticompetitive harm to the global market when we allow foreign carriers into the U.S. international resale market") ("*Foreign Carrier Market Entry NPRM*"); *Market Entry and Regulation of Foreign-affiliated Entities*, 11 FCC Rcd at 3873, 3928 (1995) ("We continue to consider it unlikely that a foreign carrier reseller would engage in discriminatory conduct . . .").

effects.[35] Indeed, the Commission's Notice of Proposed Rulemaking in this proceeding states that resale presents no significant anticompetitive concerns.[36]

Furthermore, the Commission's streamlined processes and rebuttable presumptions accorded resellers are also generally available to applicants affiliated with foreign carriers. Thus, applicants that propose to provide resale services on affiliated routes, including routes on which the affiliate has market power, are entitled to a presumption of non-dominant treatment, as long as they are not reselling the facilities-based services of an affiliated U.S. carrier.[37] Indeed, the FCC proposes in this proceeding to extend streamlined processing to the Section 214 applications of carriers who are affiliated with a facilities-based carrier from a WTO Member country where the applicant requests authority to serve that country solely by reselling the switched services of unaffiliated U.S. international carriers. The Commission notes that "streamlined processing is warranted in such a case because, as we

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[35] *See, e.g.*, *Cable & Wireless, Inc.*, 9 FCC Rcd 7283, 7284 (1994) ("[W]e have granted many authorizations for resale in particular because resellers offer significant benefits to consumers in terms of lower costs and innovative services while raising fewer concerns about anticompetitive conduct . . . ."); *Progress International L.L.C.*, Order, Authorization and Certificate, DA 97-1431 (rel. July 9, 1997) (service to Mexico); *NYNEX Long Distance Co.*, Order, Authorization and Certificate, DA 97-504 (rel. Mar. 12, 1997) (service to Gibraltar); *WorldQuest Networks, Inc.*, 12 FCC Rcd 4918 (1997) (service to Sri Lanka). The FCC has expressly rejected previous requests by U.S. carriers to condition the resale Section 214 authorizations of foreign-affiliated U.S. carriers on reduced settlement rates. *See Foreign Carrier Market Entry Order*, 11 FCC Rcd at 3930.

[36] *Foreign Participation Notice*, ¶ 31 ("We continue to believe that the resale of international switched services by a U.S. carrier whose foreign affiliate has market power in the destination country does not present a substantial possibility of anticompetitive conduct in the U.S. international services market").

[37] *See* 47 C.F.R. § 63.10(a)(4); *International Services*, 7 FCC Rcd at 7335.

have previously found, pure switched resale presents no substantial risk of a foreign carrier leveraging its market power into the U.S. international services market."[38]

The Commission cannot reverse longstanding policies without first noting that the old policies are being reversed, and then providing a persuasive justification for the need to do so. As the Supreme Court stated, there is a presumption against "changes in current policy that are not justified *by the rulemaking record*."[39] Here, since the rulemaking record is devoid of justification for imposing the resale 214 condition, the Commission cannot meet this standard.

D. The Proposed Resale Condition Is Contrary to the Public Interest.

AT&T has made no showing that its proposal is needed to protect competition or in any other manner serves the public interest. In analyzing AT&T's proposal under the public interest standard, the FCC must take into account that a resale Section 214 condition would lessen competition by excluding from the U.S. market lawful competitive offerings of U.S. carriers with foreign affiliates. As the Commission has recognized and AT&T effectively acknowledges, competition starts with resale; it allows carriers to enter the market and establish their brand presence with minimal financial risk.[40] Thus, precluding resale fundamentally alters the market entry dynamic and would seriously undercut achievement of the Commission's primary goal in this proceeding, *i.e.*, promoting effective competition in

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[38] *Foreign Participation Notice*, ¶ 134 (citing *International Common Carrier Services*, 7 FCC Rcd at 7334; *Foreign Carrier Market Entry Order* at 3292).

[39] *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (emphasis added).

[40] *See Foreign Carrier Market Entry Order*, 11 FCC Rcd at 3886; *see also* AT&T Comments at 32.

the U.S. services market. Yet as is clear from the realities of the market, there is no countervailing public interest benefit to preventing U.S. carriers with foreign affiliates from participating in the U.S. international services market, since there is no history of these carriers engaging in anticompetitive conduct of the type AT&T alleges is likely.

Even if AT&T's argument is correct -- which it is not -- not even AT&T can pretend that all foreign carriers with above-benchmark settlement rates that are in or enter the U.S. market on a resale basis will engage in below-cost pricing.[41/] Yet AT&T urges the FCC to preclude entry by all such carriers simply to guard against the mere possibility that one or a few of them might engage in a below-cost pricing scheme on a particular route. It is understandable why AT&T is eager to force out of the market those U.S. carriers with foreign affiliates who would engage in strong, lawful price competition. Clearly, there is considerable scope for price competition in the U.S. international services market, and it is in AT&T's best interests to stifle competition so as to maintain its margins. That is not a reason, however, why the FCC should act to the detriment of U.S. competition and consumer interests.

IV. THE RESALE SECTION 214 CONDITION WOULD VIOLATE THE WTO AGREEMENT.

The Commission should not adopt the proposed Section 214 resale condition because it would place the United States in violation of the World Trade Organization's Global Basic Telecommunications Services Agreement ("WTO Agreement") and the General Agreement

[41/] The FCC's Settlement Rates Decision would condition Section 214 authorizations even on routes where the foreign parent has less than a controlling interest in the foreign correspondent. The theory that a foreign parent of a U.S. carrier could instigate a "price squeeze" where the foreign parent had less than a controlling interest in the foreign correspondent is fundamentally flawed.

on Trade in Services ("GATS") to which it is a protocol. Such a condition is a pre-entry restriction in violation of the market access commitments made in the WTO Agreement, as applicable through GATS Article XVI. Specifically, the United States "offer" in the WTO's Group on Basic Telecommunications ("GBT") does not reserve a right to deny market access to carriers affiliated with foreign carriers. Any such access denial must, therefore, be justified on other grounds, and those grounds must be consistent with U.S. obligations. The competitive safeguards provisions of the Reference Paper do not provide the predicate for such departure from U.S. market access commitments since, as established above, there has been no demonstration of competitive harm or distortion flowing from the resale operations of foreign-affiliated U.S. carriers. There is, quite simply, no plausible competitive harm to prevent or remedy.[42]

Moreover, imposing a benchmark pre-condition on international switched resale authorizations would be far more burdensome than is necessary to ensure that competition in the U.S. market is not distorted. This requirement of proportionality is both an express obligation regarding licensing under Article VI(4)(b) of the GATS and, more broadly, a component of the "reasonableness" requirement in Article VI(1). Application of the condition would discourage foreign entry and destroy the ability of existing U.S. carriers with

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[42] In addition, it is far from clear (and there has been no effort to establish) that a reseller and its foreign affiliate meet the definition of a "major supplier" in the Reference Paper and incorporated in the U.S. obligations regarding competitive safeguards. Applying the definition to foreign-affiliated U.S. resellers, the only "relevant market for basic telecommunication services" is the U.S. market. No reseller-foreign affiliate combination controls "essential facilities" (as defined) in the U.S. market or is able to use its position *in the U.S. market* to affect materially the terms of participation in this market. Thus, the competitive safeguards provisions of the Reference Paper seem unavailable to justify the unscheduled market access barrier represented by a benchmark pre-condition on authorizations to engage in international switched resale.